

# United States Senate

COMMITTEE ON COMMERCE, SCIENCE,  
AND TRANSPORTATION

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August 4, 2010

Mr. Nathaniel Lipman  
President  
Affinion Group, Inc.  
100 Connecticut Avenue  
Norwalk, Connecticut 06850

Dear Mr. Lipman,

I am writing about a direct mail sales tactic Affinion Group, Inc., uses to enroll consumers in its membership clubs and discount programs. Your company's use of this tactic troubles me because consumer advocates, courts, and state and federal authorities have repeatedly described it as misleading, deceptive, and unfair.

As you know, the Senate Committee on Commerce, Science, and Transportation spent the past year investigating the online sales tactics that enabled your company and others to charge millions of online consumers for membership clubs and discount programs the consumers did not want and were unaware they had purchased. In recent months, the Committee has learned that Affinion employs a similar sales tactic by sending "live checks" to consumers through direct mail marketing. Since Affinion reformed its online practices in response to the Committee's investigation, it appears Affinion is more aggressively using "live checks" to enroll consumers in its membership programs. I am concerned that these "live checks" are deceiving consumers in the same manner as the online tactics that were the subject of the Committee's investigation.

Last year, a Committee staff report and hearing showed that, for financial gain, hundreds of websites shared their customers' billing information with companies like Affinion so that Affinion and others could then charge consumers' credit cards or debit cards for their membership clubs.<sup>1</sup> This so-called "data pass" process deceived millions of online consumers, as they were unaware websites were sharing their billing information with third party companies.<sup>2</sup> Through the "data pass" process, Affinion and other companies were able to charge consumers' credit cards and debit cards without ever obtaining the billing information directly from the consumers. Affinion and its competitors' ability to obtain this billing information created consumer confusion and cost consumers over a billion dollars in fees they were not aware they were paying. The "live check" enrollment process Affinion is currently employing

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<sup>1</sup> Senate Committee on Commerce, Science, and Transportation, *Staff Report on Aggressive Sales Tactics on the Internet and Their Impact on American Consumers* (Nov. 16, 2009) (available at <http://commerce.senate.gov>); Senate Committee on Commerce, Science, and Transportation, *Hearing on Aggressive Sales Tactics on the Internet* (Nov. 17, 2009).

<sup>2</sup> *Id.*

through direct mail marketing presents the same problem—it enables Affinion to charge a consumer for its membership programs without ever obtaining the consumer's billing information directly from the consumer.

Through the “live check” enrollment process, Affinion partners with companies that have already developed a financial relationship with consumers. Affinion then mails “live checks” to those companies' customers. The check's envelope or packaging is branded with the logo of the company familiar to the consumer and prominently alerts the consumer to a “CHECK ENCLOSED.” The “live check” contained within the mailer is typically for a small amount, between \$8 and \$10, and is payable at JP Morgan Chase Bank.<sup>3</sup> If the consumer cashes or deposits the check, the company that has a prior financial relationship with the consumer will transfer the consumer's billing information to Affinion. Affinion then “enrolls” the consumer in one of its membership programs and begins charging a monthly, recurring fee to the consumer's credit card or debit card.

In recent months, the Committee has obtained a number of “live checks” that Affinion sent to customers of 1-800-Flowers.com, Pedi-Paws, and Buyers Advantage, an Affinion discount program. An example of one of these “live checks” is provided below and another is provided as an attachment to this letter.<sup>4</sup>

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND

Check # 6671545898 50-937  
213

May 18, 2010

Payable at JPMorgan Chase Bank, N.A., Syracuse, NY

Pay to Addressee or Bearer: [REDACTED]

Amount: Eight dollars and 25/100 **\*\*\*\$8.25\*\*\***

By cashing or depositing this check you are purchasing a membership in AutoVantage<sup>®</sup> Enhanced. Void if amount over \$8.25.

Cash or deposit by: [REDACTED] VALID THROUGH 07/13/10

[REDACTED] AC5968 Z877595101102359 V

11 6671545898 10213093791 60187470411

This check does not look like a sales solicitation or a consent form to allow a company to transfer a customer's billing information to an unknown third party. The “live check” looks similar to a refund or rebate check that companies routinely mail to their customers. It effectively conceals the true nature of the proposed transaction, which is that consumers enter

<sup>3</sup> According to Affinion's most recent 10-K financial statement, JP Morgan Chase is also one of your company's largest marketing partners. Affinion Group, Inc. *Form 10-K Annual Report for Period Ending December 31, 2009* (available at <http://www.sec.gov/Archives/edgar/data/1361394/000119312510041525/d10k.htm>) (“*Membership Products*. We have over 700 marketing partners in multiple industries. Some of our largest marketing partners, such as Bank of America and JPMorgan Chase, have been marketing with us for over 10 years”).

<sup>4</sup> See Attachment A.



into an ongoing financial relationship with Affinion when they cash the check. The only portion of the front of the check that would alert a consumer to its true nature is the tiny disclosure under the amount line. It reads, "By cashing or depositing this check you are purchasing a membership in AutoVantage Enhanced."

The reverse side of the check provides a small-print disclosure describing what will happen if the check is cashed. The disclosure informs the consumer that their "credit card on file," either with Affinion or one of its partners, will be charged \$15.99 a month until the consumer calls to cancel the charge. By providing this disclosure information in small print, in the space where the consumer endorses the check, your company appears to be intentionally making it as difficult as possible for consumers to understand the true nature of the transaction.

By cashing this check I agree to a thirty-day trial offer in AutoVantage Enhanced. I understand that the \$15.99 monthly fee will be automatically charged to my credit card on file with Buyers Advantage® unless I cancel my membership by calling 1-877-747-7121 before the end of the trial period. I understand that after my first year I will be charged \$16.99 a month for the next twelve months and I will also be charged every month thereafter at the then-current monthly fee, unless I call to cancel and owe nothing further.

CHECK VOID IF ALTERED OR UNSIGNED.

X

Signature of payee required for processing.

T77585101

For years, state attorneys general and the Federal Trade Commission have repeatedly sued companies, including yours, for using "live checks" to obtain consumers' billing information. Through evidence obtained in these lawsuits and enforcement actions, it has been well documented that the "live check" enrollment process harms consumers, costing them millions of dollars in fees for membership programs they were unaware they had purchased. The evidence has shown that consumers do not understand how cashing or depositing a check can authorize one company to transfer their billing information to a third-party company, so that the third party company can charge the consumer for membership programs and services. Senior citizens and people with limited English proficiency are especially vulnerable to enrolling unknowingly in Affinion membership programs through the "live check" enrollment process.<sup>5</sup>

In 2006, sixteen state attorneys general settled a lawsuit with your company and Chase Bank to resolve allegations that your company "unlawfully deceived consumers into paying for membership programs for discounts on car and home repair, shopping, and other goods and services."<sup>6</sup> Affinion and Chase Bank, Affinion's partner, were forced to pay over \$14 million for mailing "live checks" and solicitations branded with the Chase logo to Chase customers. In reaching the settlement, the Attorney General of Illinois noted that "as a result of this packaging, many consumers thought these solicitations were rebates or rewards for being a Chase credit card or Chase mortgage customer when, in fact, they were solicitations" from Affinion.<sup>7</sup>

<sup>5</sup> Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing*, Harvard Journal on Legislation, Vol. 47, No. 2 (2010).

<sup>6</sup> The Attorneys General of Alaska, California, Connecticut, Iowa, Maine, Michigan, Missouri, North Carolina, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Vermont, and Washington each filed suit against Affinion and Chase. See e.g., Office of the Illinois Attorney General, *Attorney General Madigan Reaches Agreements with Connecticut Company and Chase Bank Regarding Allegedly Deceptive Check Solicitations* (Dec. 11, 2006).

<sup>7</sup> *Id.*

In March 2010, an Iowa district court reached the same conclusion about “live checks” as the sixteen state attorneys general had in 2006. The court ruled that Vertrue, Inc., a competitor of Affinion’s, had violated both state and federal law for using a “live check” enrollment process because it constituted “an unfair practice.”<sup>8</sup> In that case, Vertrue had partnered with consumers’ credit card issuers and had mailed “live checks” and solicitations branded with the logo of the consumers’ credit card issuers. The court found that:

Consumers receiving a low-dollar check ostensibly from their credit card issuer believed it to be a rebate or reimbursement. They deposited it without suspecting that doing so would enroll them in a program that would be charged to their credit cards. They were never asked to provide their credit card numbers or other means of payment, which would have alerted them to the fact that they were making a purchase and would be charged.<sup>9</sup>

Because of the misleading nature of Vertrue’s “live check” enrollment process, “more than 90%” of the consumers enrolled through the process never used the services they were paying for.”<sup>10</sup> Attached to this letter is an example of the type of “live check” the Iowa court found to be deceptive.<sup>11</sup> It is strikingly similar to the “live check” Affinion is currently sending to consumers. I am concerned that the “live checks” being used by Affinion mislead consumers in the same manner as those Vertrue used in Iowa.

An enforcement action brought in 1999 by the Federal Trade Commission against another company using a “live check” enrollment process also produced evidence of consumers being misled.<sup>12</sup> Over the course of a year and a half, a company mailed 4.4 million “live checks” for \$3.50 to consumers and small businesses. On the back of the check was a “small print disclosure,” which revealed that “cashing or depositing the check would constitute agreement to pay a monthly fee for internet access.” Of the 225,000 small businesses and consumers who cashed or deposited the “live checks” and were billed by the company, fewer than one percent ever used the service.<sup>13</sup> In affirming a district court decision, the 9<sup>th</sup> Circuit Court of Appeals ruled that the “live check” enrollment process was a violation of the FTC Act and found that the “mailing created the deceptive impression that the \$3.50 check was simply a refund or rebate rather than an offer for services.”<sup>14</sup>

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<sup>8</sup> Ruling as to Liability, *State of Iowa v. Vertrue, Inc.*, IA Dist. Ct. for Polk County (Mar. 18, 2010) (EQ 53486).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Attachment B. This document was provided by Vertrue to the Iowa Attorney General’s office (available at [http://www.state.ia.us/government/ag/latest\\_news/releases/mar\\_2010/Vertrue\\_SAMPLE\\_CHECK\\_SURVEY.pdf](http://www.state.ia.us/government/ag/latest_news/releases/mar_2010/Vertrue_SAMPLE_CHECK_SURVEY.pdf)).

<sup>12</sup> *Federal Trade Commission v. Cyberspace.com*, 453 F.3d 1196 (9<sup>th</sup> Circuit) (July 13, 2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



Due to the inherently misleading nature of a “live check” enrollment process, several states are considering banning their use in certain circumstances or have banned them outright. In March 2010, Wisconsin began prohibiting any company from soliciting the citizens of the state with a “live check” enrollment process.<sup>15</sup> Wisconsin’s new statute follows similar laws enacted by Utah in 2005 and Alaska and Nebraska in 2008. Those laws make it a deceptive practice for a person to offer “an unsolicited check...which, if cashed or deposited, obligates the endorser to pay for goods or services.”<sup>16</sup>

With so much information readily available about the harm a “live check” enrollment process causes consumers, I am very concerned that Affinion and its partners continue to be actively using it to “enroll” consumers in membership clubs. Companies should not employ unfair and deceptive practices to obtain consumers’ billing information, whether it is accomplished by tricking consumers into clicking a button on the Internet, or by tricking consumers into endorsing a “live check.”

Every day, millions of American consumers provide their billing information directly to thousands of companies for products and services they want to purchase. The time it takes consumers to provide their billing information to these companies has obviously not been an impediment to commerce or to thousands of successful companies. Using sales tactics that cause millions of consumers to inadvertently enroll in membership clubs is not a legitimate business model. Affinion acknowledged as much when it reformed its online enrollment practices following the Committee’s investigation.

I intend to continue examining sales tactics that enable companies to charge a consumer for products or services without obtaining a consumer’s billing information directly from the consumer. The evidence I have reviewed from the Committee’s investigation and state and federal enforcement actions shows that sales tactics that enable companies to circumvent the normal transaction process are inherently misleading for consumers.

To better understand Affinion’s use of a “live check” enrollment process and its awareness of the issues this process creates for consumers, I request that Affinion provide answers to the following questions by Friday, August 27, 2010:

1. Why does Affinion use a “live check” enrollment process to enroll consumers in its membership programs?
2. What is Affinion’s response to the charge that the “live check” enrollment process is “misleading,” “unfair,” and “deceptive”?

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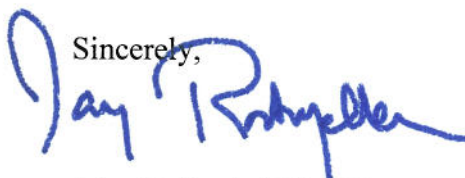
<sup>15</sup> 2009 Wisconsin Act 150 (Mar. 10, 2010).

<sup>16</sup> L.B. 781, 2008 100<sup>th</sup> Leg., 2d Sess., (Neb. 2008), Neb. Rev. Stat. §87-302(a)(16); H.B. 182, 2008 25<sup>th</sup> Leg., (Alaska, 2008), AS § 45.50.471(b)(53); H.B. 30, 2005 56<sup>th</sup> Leg., Gen. Sess., (Utah, 2005), Utah Code §13-11-4(2)(t).

3. When did Affinion begin using the “live check” enrollment process described in this letter?
4. The “live checks” obtained by the Committee show that the checks are payable at JP Morgan Chase. What is JP Morgan’s role in the “live check” enrollment process?
5. Since Affinion began using a “live check” enrollment process, how many “live checks” has it sent to American consumers?
6. What companies currently have a contract with Affinion, so that Affinion can send “live checks” to the companies’ customers?
7. Of these companies, which companies have agreed to share their customers’ billing information through the “live check” process?
8. How many consumers has Affinion enrolled in its membership programs using a “live check” enrollment process?
9. Of the consumers Affinion has enrolled in its membership programs via a “live check” enrollment process, how many have actually used the services and benefits of the membership programs?

The Committee is conducting this investigation under the authority of Senate Rules XXV and XXVI. If you have any questions, please contact Erik Jones or Melanie Tiano with the Committee staff at (202) 224-1300.

Sincerely,



John D. Rockefeller IV  
Chairman

Attachments

cc: Kay Bailey Hutchison  
Ranking Member

James Dimon  
Chairman and Chief Executive Officer  
JPMorgan Chase & Co.